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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

16 CR 749 (RA)

6 KHALIL EVANS,

7 Defendant.
-----x

8 New York, N.Y.
9 May 11, 2017
10 11:13 a.m.

12 Before:

13 HON. RONNIE ABRAMS,

14 District Judge

15 APPEARANCES

16 JOON H. KIM
17 Acting United States Attorney for the
18 Southern District of New York
19 NATHAN REHN
20 Assistant United States Attorney

21 BRADLEY HENRY
22 Attorney for Defendant

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1 (Case called)

2 MR. REHN: Good morning, your Honor. Thane Rehn for
3 the United States.

4 THE COURT: Good morning.

5 MR. HENRY: Good morning, your Honor. Brad Henry for
6 Mr. Evans, who's seated to my right at counsel table.

7 THE COURT: Good morning to both of you.

8 Mr. Evans, I understand that you wish to plead guilty
9 to Count One of the superseding indictment; is that correct?

10 THE DEFENDANT: Yes.

11 THE COURT: Before deciding whether to accept your
12 plea, I'm going to ask you certain questions so I can be sure
13 you understand your rights, that you're pleading guilty
14 voluntarily, and that you're pleading guilty because you are
15 guilty and not for some other reason. So if you don't
16 understand any of my questions, let me know. You're free also
17 to speak to your attorney at any time. Okay?

18 THE DEFENDANT: Okay.

19 THE COURT: Ms. Cavale, please place the defendant
20 under oath.

21 (Defendant sworn)

22 THE COURT: All right. So first you should know that
23 since you're under oath, if you answer any of my questions
24 falsely, you could be charged with a separate crime of perjury.

25 Do you understand that?

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1 THE DEFENDANT: Yes, I do.

2 THE COURT: I'm going to start by asking you questions
3 to ensure that you're competent to plead guilty. These are
4 questions that I ask of all defendants in this situation.

5 How old are you?

6 THE DEFENDANT: Twenty-three years old.

7 THE COURT: And how far did you go in school?

8 THE DEFENDANT: I finished high school.

9 THE COURT: Have you ever been treated or hospitalized
10 for mental illness?

11 THE DEFENDANT: No.

12 THE COURT: Have you ever been addicted to drugs or to
13 alcohol?

14 THE DEFENDANT: No, your Honor.

15 THE COURT: In the past 24 hours, have you taken any
16 drugs, medicine, or pills, or drunk any alcoholic beverages?

17 THE DEFENDANT: No, your Honor.

18 THE COURT: Is your mind clear today?

19 THE DEFENDANT: Yep.

20 THE COURT: Do you understand what's happening in
21 these proceedings?

22 THE DEFENDANT: Yes.

23 THE COURT: Okay. Does either counsel have any doubt
24 as to Mr. Evans's competence to plead guilty at this time?

25 MR. REHN: No, your Honor.

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1 THE COURT: Defense counsel, do you have any doubt as
2 to defendant's competence to plead guilty?

3 MR. HENRY: I do not, your Honor.

4 THE COURT: Thanks. So on the basis Mr. Evans's
5 responses to my questions, his demeanor here in court, and
6 representations of counsel, I find that he is fully competent
7 to enter an informed plea of guilty at this time.

8 Have you had enough time and opportunity to discuss
9 your case with your attorney, including the nature of the
10 charges and any possible defenses that you may have?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: And has he discussed with you the
13 consequences of pleading guilty?

14 THE DEFENDANT: Yes, fully.

15 THE COURT: Are you satisfied with his representation
16 of you?

17 THE DEFENDANT: Yes.

18 THE COURT: All right. Now what I'm going to do is
19 I'm going to explain certain constitutional rights that you
20 have to you. These are rights that you will be giving up if
21 you enter a guilty plea.

22 So, first, under the Constitution and laws of the
23 United States, you have a right to plead not guilty to the
24 charge in the superseding indictment.

25 Do you understand that?

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1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: And if you did plead not guilty, you would
3 be entitled under the Constitution to a speedy and public trial
4 by jury of those charges.

5 Do you understand that?

6 THE DEFENDANT: Yes.

7 THE COURT: In advance of trial, you would have the
8 opportunity to seek suppression of any or all of the evidence
9 against you on the basis that it was obtained in violation of
10 the Constitution.

11 Do you understand that?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: At trial, you would be presumed to be
14 innocent. That means that you would not have to prove that
15 you're innocent. Instead, the government would need to prove
16 your guilt beyond a reasonable doubt before you could be found
17 guilty. So even if you did nothing and said nothing at trial,
18 you could not be convicted unless a jury of 12 people agreed
19 unanimously that you are guilty.

20 Do you understand that?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: During trial, the witnesses for the
23 prosecution would have to come to court and testify in your
24 presence, where you could see them and hear them and your
25 lawyer could cross-examine them. If you wanted to, your lawyer

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1 could offer evidence on your behalf. You would be able to use
2 the court's power to compel or force witnesses to come to court
3 to testify truthfully in your defense even if they didn't want
4 to come.

5 Do you understand that?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: At trial you would have the right to
8 testify if you wanted to, but you'd also have the right not to
9 testify. And if you chose not to testify, that could not be
10 used against you in any way. So no inference or suggestion of
11 guilt could be made from the fact that you did not testify or
12 chose not to testify.

13 Do you understand that?

14 THE DEFENDANT: Yes.

15 THE COURT: At trial and at every stage of your case,
16 you'd be entitled to be represented by an attorney, and if you
17 could not afford an attorney, one would be appointed free of
18 charge at public expense to represent you.

19 Do you understand that?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: As I said before, you have the right to
22 plead not guilty. So even as you sit here right now for
23 purposes of entering a guilty plea, you have the right to
24 change your mind and to go to trial. But if you do plead
25 guilty and I accept your plea, there will be no trial and

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1 you'll be giving up all of the rights that I just described.
2 If you plead guilty, all that will remain to be done is for me,
3 for the Court, to impose sentence. I'm going to enter a
4 judgment of guilty. I'm going to sentence you on that basis
5 after getting whatever submissions I get from you and your
6 lawyer and the government, as well as a presentence report
7 prepared by the probation department. But there will be no
8 appeal with respect to whether the government could use the
9 evidence it has against you or with respect to whether you did
10 or did not commit the crime.

11 Do you understand that?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: In addition, if you plead guilty, you'll
14 have to give up your right not to incriminate yourself because
15 I'm going to ask you certain questions here in court today in
16 order to satisfy myself that you are guilty. Okay?

17 THE DEFENDANT: All right.

18 THE COURT: So I understand that you seek to plead
19 guilty, as we discussed, to Count One of the superseding
20 indictment. And Count One charges you with conspiring to
21 commit wire fraud in violation of Title 18, United States Code,
22 Section 1349.

23 Mr. Rehn, could you please state the elements of the
24 offense in question.

25 MR. REHN: Yes, your Honor. The elements of

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1 conspiracy to commit wire fraud, there are two elements:
2 first, that there was a conspiracy to commit wire fraud; and,
3 second, that the defendant intentionally joined the conspiracy
4 knowing its unlawful objective. The objective of this
5 conspiracy was to commit wire fraud.

6 The government would not have to prove that the crime
7 of wire fraud was in fact committed, but the elements of wire
8 fraud, being the objective of the conspiracy, are three:
9 first, that there was a scheme or artifice to defraud or to
10 obtain money or property by materially false and fraudulent
11 pretenses, representations, or promises; second, that the
12 defendant knowingly and willfully participated in the scheme or
13 artifice to defraud with knowledge of its fraudulent nature and
14 with specific intent to defraud, or that he knowingly and
15 intentionally aided and abetted others in the scheme; and,
16 third, that in execution of that scheme, the defendant used or
17 caused the use of interstate wires.

18 THE COURT: So, Mr. Evans, do you understand if you
19 were to go to trial, the government would need to prove those
20 elements to a jury beyond a reasonable doubt; do you understand
21 that?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: All right. Now I'm going to discuss the
24 maximum penalties. The maximum means the most that could
25 possibly be imposed. It doesn't necessarily mean it's the

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1 sentence that you will receive, but you have to understand that
2 by pleading guilty, you're exposing yourself to the possibility
3 of receiving any combination of punishments up to the maximums.

4 Okay?

5 THE DEFENDANT: All right.

6 THE COURT: So, first, the maximum term of
7 imprisonment for this crime is 20 years in prison.

8 Do you understand that?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: Any term of imprisonment could be followed
11 by a term of supervised release of up to three years.

12 Supervised release means that if you're sentenced to prison,
13 after you're released from prison, you'll be subject to the
14 supervision of the probation department. You'll be required to
15 obey certain rules, and if you violate those rules, you can be
16 returned to prison without a jury trial to serve additional
17 time even beyond your original sentence.

18 Do you understand that?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: You should also understand that there's no
21 parole in the federal system. So if you're sentenced to
22 prison, you will not be released early on parole, although
23 there is a limited opportunity to earn credit for good
24 behavior.

25 Do you understand that?

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1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: In addition to these restrictions on your
3 liberty, there are certain financial penalties that attach to
4 this crime. The maximum allowable fine is \$250,000 or twice
5 the gain you received from the crime or twice the loss to any
6 victims, whichever is greater.

7 Do you understand that?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: I'm also required to impose a mandatory
10 special assessment of \$100, and I must order restitution to any
11 persons or entities injured as a result of your criminal
12 conduct. And I can order you to forfeit all property derived
13 from the offense or used to facilitate the offense.

14 Do you understand that those are the maximum penalties
15 for this crime?

16 THE DEFENDANT: Yes, I do, your Honor.

17 THE COURT: All right. You should also be aware that
18 the punishments I've just described are those that may be part
19 of a sentence, but being convicted of a felony may have other
20 consequences.

21 You are not a United States citizen, correct?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: You should understand that as a result of
24 your guilty plea, you may be removed or deported from the
25 United States, and in certain circumstances removal or

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1 deportation may be likely or even mandatory.

2 Do you understand that?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: Do you also understand that in the future,
5 you may be denied citizenship or even admission into the United
6 States?

7 THE DEFENDANT: Yes, your Honor.

8 THE COURT: Did you discuss the possible immigration
9 consequences of your plea with your attorney?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Now, in imposing sentence, federal judges
12 are required to consider the recommendations of the federal
13 sentencing guidelines. The guidelines are a complicated set of
14 rules for determining an appropriate sentence. And although
15 judges are required to consider the guidelines, in the end, the
16 judge is required to give a sentence that she believes best
17 satisfies the purposes of the criminal law, even if that's
18 higher or lower than the guidelines recommendation.

19 Have you discussed the sentencing guidelines with your
20 attorney?

21 THE DEFENDANT: Yes, I have.

22 THE COURT: And do you understand they're only
23 recommendations to the Court?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Now, I understand that you've entered into

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a written plea agreement with the government. I have what appears to be that agreement. It's dated April 28. It's addressed to your attorney, Mr. Henry, and signed by AUSA Rehn in addition to the supervisory office. It has attached as Exhibit 1 a consent preliminary order of forfeiture as to specific property/money judgment, and I'm going to ask Ms. Cavale to show it to you.

Is that your signature?

THE DEFENDANT: Yes, your Honor.

THE COURT: Before signing this agreement, did you read it?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you discuss it with your attorney?

THE DEFENDANT: Yes, your Honor.

THE COURT: I realize it's a long document. It contains some technical legal language. But after discussing it with your attorney, do you understand all the terms of the agreement?

THE DEFENDANT: Yes, he explained it to me.

THE COURT: Sorry?

THE DEFENDANT: He explained it to me.

THE COURT: He did, okay. So I'm going to ask the government to summarize the terms of the agreement and then I'm just going to highlight a few of them.

MR. REHN: Yes, your Honor. This plea agreement is an

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1 agreement by the defendant to plead guilty to Count One of the
2 superseding indictment in exchange for the government's
3 agreement not to further prosecute him criminally for his
4 involvement in the conspiracy to defraud Apple stores in 2016.

5 The parties have agreed to a consent order of
6 forfeiture, as your Honor mentioned, in the amount of
7 \$358,739.83.

8 The parties have also agreed to a stipulated guideline
9 range based on the offense conduct and other factors. That
10 stipulated range is 15 to 21 months' imprisonment, along with a
11 applicable guidelines fine range of 7500 to \$75,000.

12 The parties agree that neither a downward nor upward
13 departure from that range is warranted, but either party may
14 seek a sentence outside of the guidelines range based upon the
15 factors to be considered by the Court in imposing sentence.

16 The agreement also includes an agreement by the
17 defendant not to file an appeal or a collateral challenge if
18 the sentence imposed is below the stipulated guideline range,
19 if the fine is below the stipulated fine range, and if the
20 restitution amount is less than or equal to \$358,739.83.

21 And, finally, there are an acknowledgment of the
22 defendant of the immigration consequences if he is not a
23 citizen of the United States, including the extremely high
24 likelihood that his deportation from the United States will be
25 mandatory.

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1 THE COURT: All right. Thanks.

2 Do you understand all of that? Do you have any
3 questions about any of that, Mr. Evans?

4 THE DEFENDANT: No, I understand it, your Honor.

5 THE COURT: So I'm just going to highlight a few of
6 those provisions. One is the guideline sentencing range of 15
7 to 21 months. That means that neither you or the government
8 can argue for a different guidelines calculation, although you
9 can seek a sentence outside of that range.

10 Do you understand that?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Okay. You should understand that the
13 agreement doesn't bind me in any way. I'm required to make my
14 own independent calculation of the guidelines and then
15 determine whether there's any basis not to follow that
16 recommendation. I'm not saying that I'm going to come up with
17 a different range, but even if I do, you won't be allowed to
18 withdraw your plea.

19 Do you understand that?

20 THE DEFENDANT: Yeah, I understand, your Honor.

21 THE COURT: Okay. Do you also understand that you're
22 giving up your right to appeal or otherwise challenge your
23 sentence as long as I sentence you to 21 months in prison or
24 less. So if I sentence you to more than 21 months, you can
25 appeal under this agreement. But if I sentence you to 21

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1 months or less, you can't appeal under this agreement.

2 Do you understand that?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: In addition, you have to understand that
5 you cannot appeal on the basis of any actual or perceived
6 immigration consequences, including deportation or removal,
7 that result from your guilty plea or conviction.

8 Do you understand that?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: Okay. Did you willingly sign this
11 agreement?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Has anyone threatened, bribed, or forced
14 you either to sign the agreement or to plead guilty?

15 THE DEFENDANT: No, your Honor.

16 THE COURT: Other than what's in the plea agreement,
17 has anyone offered you any inducement to plead guilty?

18 THE DEFENDANT: No, your Honor.

19 THE COURT: Has anyone made any promise to you as to
20 what your sentence will be?

21 THE DEFENDANT: No, your Honor.

22 THE COURT: And do you understand that if anyone even
23 attempted to predict what your sentence will be that that
24 prediction could be wrong?

25 THE DEFENDANT: Yes.

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1 THE COURT: Even if you don't get the sentence that
2 you expect for or hope for, you still won't be allowed to
3 withdraw your plea. Do you understand that?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: All right. And we discussed the consent
6 order of forfeiture. So now that you've been advised of the
7 charge against you and the possible penalties you face and the
8 rights you're giving up, is it still your intention to plead
9 guilty to this charge?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: So now I'm going to ask you the official
12 question with respect to Count One of the superseding
13 indictment: How do you plead?

14 THE DEFENDANT: Guilty.

15 THE COURT: And do you admit or deny the forfeiture
16 allegation?

17 THE DEFENDANT: Can you repeat that, please.

18 THE COURT: Yeah. So there's a forfeiture allegation
19 in the indictment and I'm asking you if you consent to and
20 admit that forfeiture allegation.

21 THE DEFENDANT: Yes, I consent to it.

22 THE COURT: All right. So now tell me in your own
23 words what you did that makes you believe that you're guilty of
24 this crime.

25 THE DEFENDANT: In March 2016, I agreed with one other

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1 person to defraud --

2 THE COURT: You know what, just speak really slowly.
3 It can be hard to hear in this room. So if you can speak loud
4 and clear, that would be great.

5 THE DEFENDANT: In March 2016, I agreed with one other
6 person to defraud Apple by acting as a decoy while the other
7 person manipulated the payment so that products were given by
8 Apple but no payment was made. I knew what I was doing was
9 wrong when I did it.

10 THE COURT: Does the government want to make a proffer
11 both with respect to venue and the interstate commerce
12 elements?

13 MR. REHN: Yes, your Honor. The incident the
14 defendant is describing in which he participated took place I
15 believe outside the district. But if the case were to proceed
16 to trial, the government would present evidence that at least
17 one coconspirator took acts in furtherance of the conspiracy in
18 the Southern District of New York.

19 THE COURT: All right.

20 MR. REHN: And in terms of the interstate wires
21 element, the government would submit evidence at trial that in
22 perpetrating this scheme, when the payment device was
23 manipulated by a coconspirator, that initiated a wire
24 transaction approving a credit card transaction which was then
25 later canceled by a coconspirator, again, using interstate wire

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1 communications.

2 THE COURT: Can you please state what the government's
3 proof would be if the case were to go to trial.

4 MR. REHN: Yes, your Honor. If the case proceeded to
5 trial the government would present surveillance video and
6 transaction records obtained from Apple that would show the
7 defendant and coconspirators perpetrating this scheme,
8 transaction records showing that the transactions resulted in
9 obtaining large amounts of merchandise without any actual
10 payments taking place. It would also include testimony
11 regarding how the scheme was perpetrated and the physical
12 device on which the scheme was perpetrated as well.

13 It would, in addition, with respect to this defendant,
14 include evidence obtained at the time of the defendant's
15 arrest. He was arrested with other coconspirators in October
16 of 2016 along with -- they were all in a hotel room together
17 with evidence consistent with their role in the conspiracy,
18 including a large amount of currency and a number of Apple
19 devices.

20 THE COURT: And do you have any additional questions
21 you'd like me to ask Mr. Evans?

22 MR. REHN: No, I don't believe so, your Honor.

23 THE COURT: Do both attorneys agree that there's a
24 sufficient factual predicate for the guilty plea?

25 MR. HENRY: Yes, your Honor.

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1 MR. REHN: Yes, your Honor.

2 THE COURT: All right. So, Mr. Evans, because you
3 acknowledge that you're in fact guilty as charged in the
4 superseding indictment and because I'm satisfied that you
5 understand your rights, including your right to go to trial,
6 and that you're aware of the consequences of your plea,
7 including the sentence which may be imposed, I accept your
8 guilty plea to Count One of the superseding indictment.

9 I referenced a presentence report earlier that the
10 probation department is going to prepare. Does defense counsel
11 wish to be present for this?

12 MR. HENRY: I do, your Honor.

13 THE COURT: All right. If you choose to speak to the
14 probation department, please make sure anything you say is
15 truthful and accurate. I'll read the presentence report
16 carefully. It will be important to me into deciding what
17 sentence to impose. You and your lawyer have a right to
18 examine the report and comment on it at the time of the
19 sentencing, so I urge you to read it carefully and to discuss
20 it with your attorney.

21 I understand there's a request for an expedited
22 sentencing; is that correct?

23 MR. HENRY: That's correct, your Honor. I've been,
24 well, I attempted to get in contact with Ms. Williams at the
25 probation office to run through their procedure that we need to

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1 do. I understand in codefendant Kalibar's case a similar
2 procedure was undertaken. And I've spoken to Noam Biale, who
3 is his attorney, to try to guide me along what I need to do to
4 follow a similar path. I'll do that and advise the Court if
5 they're able to do the expedited.

6 THE COURT: What I'd like to do is I'll set a
7 sentence. Does July 5 make sense?

8 MR. HENRY: That's fine with us, your Honor.

9 MR. REHN: We can be available, your Honor.

10 THE COURT: All right. So July 5, why don't we say at
11 3:30. And then if you need any help, Mr. Henry, with respect
12 to the expedited nature, let me know.

13 MR. HENRY: Thank you.

14 THE COURT: So the government should provide the
15 probation officer with its factual statement within a week.
16 And defense counsel, normally I say that you should have your
17 client interviewed within two weeks, but I think you should
18 move as quickly as you can here. And I'll just ask counsel to
19 refer to my individual rules and practices in criminal cases.
20 Among other things, consistent with those rules, defense
21 submissions are due two weeks prior to sentencing and the
22 government's submission is due one week prior to sentencing.

23 And the defendant shall remain in custody pending
24 sentence.

25 Are there any other applications at this time?

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1 MR. REHN: None from the government, your Honor.
2 THE COURT: Mr. Henry?
3 MR. HENRY: Nothing from the defense.
4 THE COURT: Thank you. We're adjourned.

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